

## Wage and Hour Division, Labor

## § 780.605

### § 780.601 Statutory provision.

Section 13(b)(13) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

Any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1).

### § 780.602 General explanatory statement.

Ordinarily, as discussed in subparts D and E of this part 780, an employee who in the same workweek engages in work which is exempt as agriculture under section 13(a)(6) or 13(b)(12) of the Act and also performs nonexempt work to which the Act applies is not exempt in that week (§ 780.11). Employees of a farmer are not employed in work exempt as "agriculture" while engaged in livestock auction operations in which the livestock offered at auction includes livestock raised by other farmers (*Mitchell v. Hunt*, 263 F. 2d 913) (C.A. 5); *Hearnsberger v. Gillespie*, 435 F. 2d 926 (C.A. 8). However, under section 13(b)(13) an employee who is employed by a farmer in agriculture as well as in livestock auction operations in the same workweek will not lose the overtime exemption for that workweek, if certain conditions are met. These conditions and their meaning and application are discussed in this subpart.

#### REQUIREMENTS FOR EXEMPTION

### § 780.603 What determines application of exemption.

The application of the section 13(b)(13) exemption depends largely upon the nature of the work performed by the individual employee for whom exemption is sought. The character of the employer's business also determine the application of the exemption. Whether an employee is exempt therefore depends upon his duties as well as the nature of the employer's activities.

Some employees of the employer may be exempt in some weeks and others may not.

### § 780.604 General requirements.

The general requirements for exemption under section 13(b)(13) are as follows:

(a) Employment of the employee "primarily" in agriculture in the particular workweek.

(b) This primary employment by a farmer.

(c) Engagement by the farmer in raising livestock.

(d) Engagement by the farmer in livestock auction operations "as an adjunct to" the raising of livestock.

(e) Payment of the minimum wage required by section 6(a)(1) of the Act for all hours spent in livestock auction work by the employee.

These requirements will be separately discussed in the following sections of this subpart.

### § 780.605 Employment in agriculture.

One requirement for exemption is that the employee be employed in "agriculture." "Agriculture," as used in the Act, is defined in section 3(f) as follows:

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

An employee meets the tests of being employed in agriculture when he either engages in any one or more of the branches of farming listed in the first part of the above definition or performs, as an employee of a farmer or on a farm, practices incident to such farming operations as mentioned in the second part of the definition (*Farmers Reservoir & Irrigation Co. v. McComb*, 337

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U.S. 755). The exemption applies to “any employee” of a farmer whose employment meets the tests for exemption. Accordingly, any employee of the farmer who is employed in “agriculture,” including laborers, clerical, maintenance, and custodial employees, harvesters, dairy workers, and others may qualify for the exemption under section 13(b)(13) if the other conditions of the exemption are met.

### **§ 780.606 Interpretation of term “agriculture.”**

Section 3(f) of the Act, which defines “agriculture,” has been extensively interpreted by the Department of Labor and the courts. Subpart B of this part 780 contains those interpretations which have full application in construing the term “agriculture” as used in the 13(b)(13) exemption.

### **§ 780.607 “Primarily employed” in agriculture.**

Not only must the employee be employed in agriculture, but he must be “primarily” so employed during the particular workweek or weeks in which the 13(b)(13) exemption is to be applied. The word “primarily” may be considered to mean chiefly or principally (*Agnew v. Board of Governors*, 153 F. 2d 785). This interpretation is consistent with the view, expressed by the sponsor of the exemption at the time of its adoption on the floor of the Senate (107 Cong. Rec. (daily ed., April 19, 1961), p. 5879), that the word means “most of his time.” The Department of Labor will consider that an employee who spends more than one-half of his hours worked in the particular workweek in agriculture, as defined in the Act, is “primarily” employed in agriculture during that week.

### **§ 780.608 “During his workweek.”**

Section 13(b)(13) specifically requires that the unit of time to be used in determining whether an employee is primarily employed in agriculture is “during his workweek.” The employee’s own workweek, and not that of any other person, is to be used in applying the exemption. The employee’s employment must meet the “primarily” test in each workweek in which the exemption is applied to him.

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### **§ 780.609 Workweek unit in applying the exemption.**

The unit of time to be used in determining the application of the exemption to an employee is the workweek. (See *Overnight Transportation Co. v. Missel*, 316 U.S. 572.) A workweek is a fixed and regularly recurring interval of seven consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing of the workweek for the purpose of escaping the requirements of the Act is not permitted.

### **§ 780.610 Workweek exclusively in exempt work.**

An employee who engages exclusively in a workweek in duties which come within the exemption under section 13(b)(13) and is paid in accordance with the requirements of that exemption, is exempt in that workweek from the overtime requirements of the Act.

### **§ 780.611 Workweek exclusively in agriculture.**

In any workweek in which the employee works exclusively in agriculture, performing no duty in respect to livestock auction operations, his exemption for that week is determined by application of sections 13(a)(6) and 13(b)(12) to his activities. (See subparts D and E of this part.)

### **§ 780.612 Employment by a “farmer.”**

A further requirement for exemption is the expressed statutory one that the employee must be employed in agriculture by a “farmer.” Employment by a nonfarmer will not qualify an employee for the exemption.

### **§ 780.613 “By such farmer.”**

The employee’s primary employment in agriculture during the exempt week is also required to be by “such farmer.” The phrase “such farmer” refers to the particular farmer by whom the employee is employed in agriculture and who engages in the livestock auction operations as an adjunct to his raising of livestock. Even if an employee may spend more than half of his work time